

Mario Zanghi 96A5881
Five Points Correctional Facility
State Re. 96, Box 119
Romulus, N.Y. 14541

99-CV-6293CJS

APR 14 2005

April 13, 2005

Hon. Charles J. Siragusa
United States District Court
U.S. District Courthouse
100 State Street
Rochester, N.Y. 14614-1363

FILED
05 APR 22 AM 9:25
U.S. DISTRICT COURT
W/DN W.D. 22-474

Dear Judge Siragusa:

I am writing pertaining to a few issues that I believe are necessary in your reviewing of my petition. I bring these to your attention in the hope of showing just how undermining my arrest and trial and in-between procedures were done by the homicide detectives, the DA and the lawyer who was supposed to have my best interests in mind.

1) Enclosed are newspaper articles about the lead homicide detective in my case – the very one who had direct influence on the showing of and putting together the pictures that were used in the photo array that was shown to the witnesses – to which there are questions of misconduct not just in the photos themselves, but as to the genuine legitimacy of the time this detective had to guide, entice or influence the first witness's decision (see photo array). This detective states that as soon as he opened the photo array packet witness No. 1 right away points to me - no more than seconds. But the photo array sign and time show it took over 25 minutes to do so (see Huntley Hearing, pg.11, line24 and pg.13, line 16). Then, this detective goes to witness No. 2's house and upon arriving, they find this witness on the phone. There are issues here that I believe are not right and the fact that this homicide detective is under federal arrest on charges of wrong doing and has been suspended from his duties gives light to these issues on identification only because I believe I was used as the scapegoat by my lawyer, the detectives and the District Attorney's office for a conviction. The fact that I was never given the opportunity to confront my accusers is but one more issue on this and I believe a hearing if not a new trial would help bring out a lot that has been unsaid by a lawyer who did not have my best interest in mind and who knew that his firm was representing two people for the same crime from the beginning and still chose to ignore it and when confronted about it, lied to the Court along with the DA who mislead the Court throughout the Gomberg hearing into believing there was only a meaningless potential of a conflict of interest when in fact he was well aware of the full blown conflict by representing the issues of the John Doe hearings in a false and misleading way and then withholding the information, to which in and of itself is considered Rosario material. So I ask the Court to see my issues as worthy of attention and grant me a hearing where I can present my claims properly.

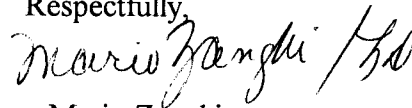
2) Also enclosed is a recent ruling on one of the same issues I have in front of the Court. Although it is from the Second Circuit, I believe the law is in time with my issue and I

ask that it be considered under the conflict of interest because not only does it have law under the conflict, but also because I believe that my lawyer and his firm were acting under the same scheme as noted in the transcript that is attached with the ruling with the Second Circuit Court where the attorney who may be called as a witness be disqualified due to conflict of interest. My lawyer also acted in the fashion when he made an application to the Court to allow him to testify for me (see transcript 1283, lines 6,7,8,9,10).

I would like to apologize for presenting this in this way but I am pro se in my petition and only know this means of addressing an issue and ask that the Court not hold it against me for doing such.

In closing, I ask to please consider all this new information and the petition as a whole and I also would like to inform the Court of my address change which can be found at the top of this letter. I thank you for your time and await your response.

Respectfully,

A handwritten signature in cursive script that reads "Mario Zanghi". The signature is written in dark ink and includes a stylized flourish at the end.

Mario Zanghi



ARRESTS

This... we heard the... nest cards... and... schools...

Ortiz... gated... of violence... date... change... Police Commissioner... wiretapped calls...

Dima said a cloud of suspicion has hung over Ortiz for several years. In August 2001 FBI agents searched the... lockers of... detectives, looking for evidence... bribes... ers. None... er changed in connection with the search.

After the... frequently... low officer... fairly targeted him.

"(Ortiz) was rumored, suspected and targeted for years... said... cer try to tarnish... under... tice will be served... integrity... sion. We...

The... Carey Cantwell... conversation... different... phone... and (Ortiz) was... mitted...

Wiretaps... long investigation... particular... and other... said...

"Because... we received... legat... sion... is... ching...

Motivation Record

DANCE: The Southern... County Dance Society...

Detective knew for years he was FBI target

By LOU MICHEL
AND DAN HERBECK

NEWS STAFF REPORTERS

Detective Andres "Andy" Ortiz knew the FBI had been targeting him for years.

In August 2001, agents searched his locker and desk at Police Headquarters, looking for evidence of bribery and shake-downs of drug dealers. No charges were ever filed in connection with those searches.



**Andres Ortiz
says the truth
will come out.**

After that, Ortiz made no secret that he was upset with the FBI. He told fellow officers the federal government had wrongly and unfairly targeted him.

On Thursday, wire-tapped conversations between the detective and Franklin Johnson, an accused marijuana kingpin, led to Ortiz's arrest on a felony count

of using a telephone to facilitate drug trafficking.

According to court papers, Ortiz assisted the drug ring on three separate occasions last June:

- On June 27, agents said they recorded Ortiz warning Johnson that "the ---ing feds" were investigating Johnson and his associates.

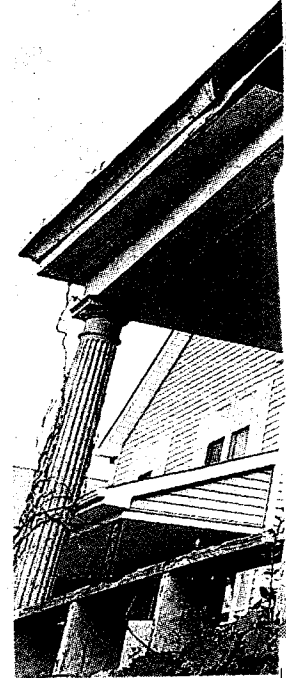
- After Rashawn Demer, one of Johnson's alleged henchmen, was taken in for questioning about some shootings on June 28, Ortiz arranged to have Demer released to Johnson's custody, with no charges placed against Demer.

- Also on June 28, Ortiz warned Johnson by telephone not to go to a meeting with a former member of the Donald "Sly" Green drug ring. Ortiz told Johnson that Green's associate was probably under investigation by federal agents.

"(There) is no legitimate reason for Ortiz to have released confidential information to a known major narcotics trafficker," FBI Agent Brian L. Cid said in the court documents. "Intercepted telephone conversations indicated that Johnson conspires with Detective Andres Ortiz to further his drug trafficking activities."

In a Friday interview at his Amherst home, the 48-year-old Ortiz said that when the whole story comes out, people will see that he was only trying to help his department solve some cases of drug-related violence.

"The truth will come out," he said, sit-



**Julia Jones is one of 200
replace the rotted wood**

Mix

*City officials
program lac
'sense of urg*

By BRIAN MEY

NEWS STAFF REPO

At 82, Julia Jones has had enough Buffalo winters to running out of time this summer. She is planning to replace the Michigan Avenue home's rotting wood above her porch.

She had hoped to have done this spring, shortly after the city's plan for a rehabilitation of the city.

The paint continues to rot. The wood continues to rot. It's her fault, but the city's, of

Jones is among 200 citizens who have waited as long as 10 years for loans for such work as fixing leaking roofs, placing windows.



aroon Cantillon/Bufalo News
vices for Sgt. David L.

e monsignor said.

nily members and the
ary family provided a
to Roustum, a mixture
cision and personal trib-
t. John Vianney Church
Holy Cross Cemetery,

inos

me an all-too-familiar

n Page B2

ic woes



sharon Cantillon/Bufalo News
, director of Episcopal
art the pantry in 1987.

e News Neediest Fund,
so try to distribute extra
last more than a day.

1 to the holiday meal,
diest Fund, along with
dozen other local pro-
toys collected and dis-
igh the Western New
Partnership.

holiday season, toy do-

on Page B2

arts organizations around the country,"
said BPO Board Chairman Angelo Fatta.

The BPO finished three of the four pre-
vious seasons in the black. The exception
was fiscal 2001-02, when state and local
funding cuts in the aftermath of the terror-
ist attacks of Sept. 11, 2001, wreaked havoc
on cultural budgets.

Highlights of the orchestra's 2003-04
season included:

- Total attendance of more than
190,000 for 130 concerts and events.

- National Public Radio broadcasts
that reached millions of listeners across
the United States and Canada.

- Music education programming for
161 local schools benefiting 27,363 stu-
dents.

See **Deficit** on Page B2

Former officer gives inside look at extent of corruption

By DAN HERBECK

NEWS STAFF REPORTER

Rene Gil knows all about crooked cops
in the Buffalo Police Narcotics Unit.

He was one of them.

Gil, 45, an ex-cop and admitted cocaine
trafficker, offered a disturbing inside look
at police corruption Monday while ap-
pearing as a witness in the federal trial of
suspended Detectives Paul D. Skinner and
Sylvestre Acosta.

Testifying for more than four hours, Gil
told how some narcotics investigators
stole money on drug raids, planted drugs
on suspects and lied to judges to get
search warrants. He also spoke about his
own drug dealing, which went on for more
than a year before he was caught by the
FBI in May 2001.

While alleged corruption in the Narcot-
ics Unit has been discussed in news re-
ports for more than a decade, Gil is the
first former detective from the unit to tes-
tify in detail about the illegal acts.

"Would you steal every time you exe-
cuted a search warrant?" Assistant U.S. At-
torney James P. Kennedy asked Gil.

See **Trial** on Page B2

ages B4, B5 • Weather / Page B12

JYSE / Page B10 • Nasdaq / Page B11

Hidden camera catches divvying-up of drug cash

TRIAL • from B1

"No," Gil answered. "If the right people were there, (people) who had done this before, we would do it."

"Who were the right people?" the prosecutor asked.

Gil identified himself, Skinner and Acosta as three who would take part in thefts. He also identified Skinner's brother, Gerald T. Skinner, who is already in prison for such activity, and Andres Ortiz, a suspended detective who was recently arrested on charges of providing information to a drug dealer.

The short, gray-haired former narcotics investigator testified that he and other detectives — sometimes including Acosta and Paul Skinner — would split up thousands of dollars of loot taken illegally from the homes of drug dealers.

In early 1998, Gil said, detectives stole thousands during a raid on West Delavan Avenue. He said the cash was in a secret compartment in the frame of a water bed. He said Gerald Skinner gave him and Acosta \$1,000 each. He said Paul Skinner later complained he never received his share.

When he told Gerald Skinner of his brother's complaint, Gil said, Gerald Skinner responded: "(Expletive) my brother. He didn't take care of me when he ripped off the Jamaicans last week. Why should I take care of him?"

Gil said a number of detectives were well aware for years that the FBI was conducting an investigation into their activities. In late 1998, he said, a group of detectives met on the West Side, where they sat in Paul Skinner's truck and discussed what they would do if one of them got caught.

"If one of us were to get caught and went to jail, he would keep his mouth shut, and the rest of us would take care of his family," Gil said the detectives decided.

He said Acosta, Gerald Skinner and Paul Skinner's then-partner, Robert Hill, were also present for the discussion. Robert Hill is also serving a federal prison term for stealing drug money.

Gil also disclosed that in February 1998, a hidden camera — installed in the Narcotics Unit office by a command

the camera, Gil went to his captain and explained he was only paying back some money that two other detectives had lent him. He testified that the incident led to his leaving the Narcotics Unit and transferring to the Offenses Squad.

Gil, who agreed to cooperate with the FBI and took a plea deal more than two years ago, was the 13th witness in the trial of Paul Skinner, 46, and Acosta, 50, who are accused of violating the civil rights of drug suspects.

The verdict, which could come late this week or sometime next week, is likely to turn on how much credibility jurors give to Gil and other witnesses, including jailed drug dealers and informants.

Defense attorneys Patrick Brown and John J. Molloy hammered away at Gil for hours, portraying him as a liar who would turn against friends in exchange for a shortened prison sentence.

Gil acknowledged that he was selling drugs for a major cocaine trafficker in Buffalo before FBI agents caught him arranging a cocaine purchase for his ex-wife. He also said he helped a nephew to deal drugs by telling him which cars were being used by narcotics investigators.

He told Brown that he recently took a guilty plea to grand larceny charges in Florida, where he began working in a pawnshop after taking his plea deal.

"Do you have difficulty telling the truth?" Brown asked.

"Not now, I don't," Gil said.

Gil said he was introduced to drug investigations in 1989, when he was part of a group of officers detailed to attack drug trafficking on Maryland Street. He said he was taught to get arrests "by whatever means necessary," regardless of civil rights concerns.

Later, Gil said, he was working with Ortiz when Ortiz stole a wad of cash from a West Side drug suspect. He said Ortiz pocketed the money and let the suspect go, saying, "This is your lucky day. Now get out of here."

Ortiz later gave him \$150, calling it "lunch money," Gil testified.

Kennedy asked Gil why some city detectives took "shortcuts" — such as planting evidence or using false information on search warrants — in this

Ortiz - Direct - Marusak

6

Mr. Herbert Greenman, and we're here to commence
the conducting of Wade and Huntley hearings.

People call Detective Andres Ortiz.

A N D R E S O R T I Z , having first been duly sworn,
testified as follows:

THE CLERK: State your name.

THE WITNESS: Andres Ortiz, O-R-T-I-Z,
A-N-D-R-E-S.

THE CLERK: Thank you.

DIRECT EXAMINATION BY MR. MARUSAK:

Q. Detective Ortiz, how long have you worked for the
Buffalo Police Department?

A. Be sixteen years in February.

Q. How long have you been assigned to the Homicide
Bureau?

A. Since January this year.

Q. Directing your attention to July 22nd of this
year, did you participate in the investigation into the July
20th shooting death of Abdul Bodden?

A. Yes, sir.

Q. And on that date did you, yourself, prepare a
photo array in connection with that investigation?

A. Yes, sir.

Q. I'm showing you now what has been marked People's

Ortiz - Direct - Marusak

7

Exhibit 1 for identification. Please take a look at both pages of that. Is that the photo array that you assembled?

A. Yes, sir, it is.

Q. And as you look at it now in terms of the photos that are in the slots in the manner in which they are affixed there, is that photo array accurate and fairly depict the photo array that you assembled back on July 22nd?

A. Yes, sir.

Q. Now, does the defendant, Mario Zanghi's photo appear in that array?

A. Yes, sir, it does.

Q. What number is it?

A. Position marked number five.

Q. Now, on the day before, namely, on July 21st, 1995, were you working?

A. Yes, sir.

Q. And on the 21st of July did information come to you in your role as a homicide detective as regards this defendant being a suspect in the July 20th shooting?

A. Yes, sir.

Q. And what source -- what was the source of that information? Who was it?

A. PO from Precinct 6, Calloway, called Homicide Bureau Office?

Ortiz - Direct - Marusak

8

A. What -- did you speak yourself with Officer Calloway?

A. Yes, sir, I did.

Q. Over the phone?

A. Yes.

Q. What did he inform you?

A. He stated that he had received information that the people involved in the shooting on Bryant Street were Mario Zanghi and Ralph Amoia.

THE COURT: Excuse me. You were speaking to Officer Calloway or the information came to Officer Calloway?

THE WITNESS: I was speaking to Officer Calloway.

THE COURT: All right. Who in turn allegedly received information from?

THE WITNESS: Lieutenant Leggio -- he's PO Leggio, I'm sorry, from Precinct 6.

THE COURT: That?

THE WITNESS: That Ralph Amoia and Mario Zanghi were involved in the shooting of Bolden on Bryant Street.

Q. You mean Bodden, B-O-D-D-E-N?

A. Yes.

Ortiz - Direct - Marusak

9

Q. In reference to the police officer from whom Calloway learned this information, do you remember that officer's name?

A. Repeat that, please.

Q. You spoke with who over the phone?

A. Calloway.

Q. And what is your understanding as to what officer provided Calloway with the information, do you remember?

A. Yes, I do. I'm sorry. I said Leggio. It was Mike Elliott.

THE COURT: It was who?

THE WITNESS: Mike Elliott.

THE COURT: Officer, before you answer on an important matter such as this, I would ask you to give it some thought. Information from Mike --

THE WITNESS: Elliott.

THE COURT: Thank you, sir.

Q. Now, after learning that -- after learning that information, did you put together that photo array?

A. Yes, sir, I did.

Q. And were you operating under any time restraints as regards to who you wanted to show this photo array to?

A. Yes, sir, we were.

Q. Could you please explain that?

Ortiz - Direct - Marusak

10

A. The two young men, Mr. Evans and Turpin, were at home at the time and they were on -- they were going to attend the funeral of Mr. Bodden in New York City and they were going to leave that afternoon.

Q. And when you say that afternoon, you mean the date of what?

A. 22nd.

Q. And did you understand Mr. Evans and Mr. Turpin to be eyewitnesses to this shooting?

A. Yes, sir.

Q. When you put together the photo array, Detective Ortiz, what were you looking for in terms of the other photographs that you used as opposed to the defendant's photo?

A. Well, we had to get people with a similar build and hair style, so we were limited in the pictures that we could use.

Q. When you say similar build, are you referring to the facial features?

A. Correct.

Q. After putting together the photo array, who was the first witness that you showed the array to?

A. Mr. Evans.

Q. And did you do that at his home?

Ortiz - Direct - Marusak

11

A. Yes, sir, we did.

Q. And how did you make arrangements to show Mr. Evans the photo array?

A. We had called him on the phone to see if he would be available.

Q. Who were you working with?

A. Detective Sergeant Lipinczyk.

Q. And do you remember which of the two of you spoke with Mr. Evans?

A. I did.

Q. What did you advise him?

A. I just told him we had some pictures we would like to bring by for him to look at.

Q. What did he say in response to that?

A. He said, sure, he'll be available for a short period.

Q. What time of the day was this, Detective?

A. That I called, had to be about 10:40.

Q. In the morning or in the evening?

A. In the morning.

Q. Do you remember about what time you arrived at his residence?

A. At approximately 11 A.M.

Q. And besides you and Detective Sergeant Lipinczyk,

Ortiz - Direct - Marusak

12

1
2 were any other officers with you?

3 A. No, sir.

4 Q. Could you please tell the Court now what happened
5 upon your arrival at Mr. Evans' residence?

6 A. We entered the house. He welcomed us in and we
7 went into the, I believe it was the kitchen. Told him that
8 we had a photo array of people that we would like him to view
9 to see if he could recognize anybody that was involved in the
10 incident. We placed the photo array on the table with the
11 photos covered. He opened the top covering of the photo
12 array, looked at the photo array and picked out the
13 individual in slot five.

14 Q. How much time elapsed between the time you
15 displayed the six photos until the time that he picked out
16 slot number five?

17 A. Oh, it was within ten seconds, I would say.

18 Q. And is that your best estimate?

19 A. Yes, sir.

20 Q. And did he say anything upon making that
21 identification?

22 A. Yes. He said that he's the one who shot Abdul
23 Bodden. He shot Abdul Bolden.

24 Q. Now, after he made that identification did you
25 record or memorialize the identification?

Ortiz - Direct - Marusak

13

A. Yes, sir.

Q. Detective, I'm going to now refer you to the reverse side of the front page of the photo array and ask you if there is a memorialization of the identification there?

A. Yes, there are.

Q. Please explain to the Court how that occurred.

A. Well, once he identifies the individual in the slot, we have him sign a sticker here that we have him place on the position where the slot was and it states what he said and that he identified the individual in slot number five.

Q. Did you ask Mr. Evans to sign that sticker?

A. Yes. He signs it and it's dated and timed and initialed by both myself and Sergeant Lipinczyk.

Q. What time does it reflect?

A. 11:22 A.M.

Q. How does it describe the identification?

A. Shot Abdul Bodden.

Q. Now, I'm going to show you what has been marked as People's Exhibit 2 for identification. Do you recognize that?

A. Yes.

Q. And does that appear to be -- tell us what it is?

A. This is our standard P-88 form that we put with the photo arrays to who views them and what they pick out and

Ortiz - Direct - Marusak

14

they say when they pick it out.

Q. Did you fill out the document?

A. No. This one was made out by Sergeant Lipinczyk.

Q. In your presence?

A. Yes, sir.

Q. Who signed it?

A. Robert Evans.

Q. And is there any other signature on there?

A. Subscribed and notarized by Sergeant Lipinczyk.

Q. Was this document filled out at the time shortly following the identification procedure?

A. Yes, immediately.

Q. And but for the redaction of the address and phone number of the witness, is this a complete and accurate copy of this affidavit?

A. Yes, sir.

Q. Detective, up until that point in time had you shown this witness any photographs or conducted any identification procedures?

A. No, sir.

Q. To your knowledge, had any such identification procedures or other photos been shown to this witness?

A. No, sir.

Q. About how long would you estimate you remained at

Ortiz - Direct - Marusak

15

Mr. Evans' residence for purposes of this identification procedure?

A. Approximately twenty-two minutes. As soon as we were done, we left.

Q. And to whose residence did you then go?

A. To Mr. Turpin's house.

Q. And it took you about how long to get there?

A. It was right around the corner, about less than five minutes.

Q. Still in Buffalo?

A. Yes, sir.

Q. And can you please describe for the Court now how you met -- met with Mr. Turpin at that point?

A. Well, we knocked on the front door and he opened the door and invited us in.

Q. Before actually arriving at his house, had you or your partner made any contact with Mr. Turpin earlier in the day?

A. No, sir.

Q. To your knowledge, were there any arrangements made for you to meet him?

A. Oh, yes. We did call to see if he'd be available to view the photo array.

Q. When did you do that?

Ortiz - Direct - Marusak

16

A. Probably about 10:40, the same time that we called Mr. Evans.

Q. And did you make those arrangements or did your partner?

A. I did.

Q. What did you tell Mr. Turpin?

A. I just asked him if he'd be available for a few minutes to view the pictures that we have.

Q. And what did he say?

A. He said sure.

Q. Please tell us, then, after entering the residence of Mr. Turpin what you did?

A. We went into another room, which would be the second room, dining room, second room, placed the photo array on the table there, covered, and asked him to remove the cover and see if he could identify anybody that was at the shooting.

Q. And, again, was your partner with you, Detective Sergeant Lipinczyk?

A. Yes, sir.

Q. What happened at that point?

A. He immediately pointed to slot number five and stated, this is the one who shot Bodden and shot at me.

Q. Now, before showing Mr. Turpin the photo array

Ortiz - Direct - Marusak

17

1
2 did you ask him any questions?

3 A. Yes, sir, I did.

4 Q. What did you ask him?

5 A. Well, when he opened the door, he was on the
6 telephone, and I asked him who was on the phone. And he
7 stated some other name, which I didn't really pay attention
8 to. And I had asked him if he had talked to Mr. Evans and he
9 said no.

10 Q. Now, did you memorialize Mr. Turpin's
11 identification in the same fashion as you had Mr. Evans'
12 identification?

13 A. Yes, sir, we did.

14 Q. And looking on the reverse side again of People's
15 Exhibit 1, is there a similar signature sticker for Mr.
16 Turpin's identification?

17 A. Yes, sir, there is.

18 Q. Was that signed and dated?

19 A. Yes, sir, it is.

20 Q. And showing you People's Exhibit 3 marked for
21 identification, is that a similar affidavit that Mr. Turpin
22 signed in your presence regarding this procedure?

23 A. Yes, it is.

24 Q. Is that a true and accurate copy of the affidavit
25 but for the address and phone number being redacted?

Ortiz - Direct - Marusak

18

A. Yes, sir.

Q. And, to your knowledge, Detective -- well, had you shown any photos or conducted any identification procedures or had any been done in your presence to this witness prior to this day?

A. No, sir.

Q. And, to your knowledge, had there been any other photos or identification procedures conducted with Mr. Turpin prior to this?

A. No, sir.

Q. Now, up until this point in time, and I'm speaking of the time after which you had shown the photo array to both witnesses, up until that point in time had there been any arrest warrants issued for the defendant, Mario Zanghi?

A. No, sir.

Q. Up until that point in time had there been anyone identified as the shooter besides Mario Zanghi?

A. No, sir.

Q. Upon your concluding the identification procedure with Mr. Turpin, where did you go?

A. We returned back to the Homicide Office.

Q. What was physically -- what was done with the photo array?

Ortiz - Direct - Marusak

19

A. It was put back within the folder and put into the -- it wasn't put in -- we maintained the file open because we were going to see, as far as to get him, you know, picked up to be brought in.

Q. But in terms of the physical location of this photo array, where was it kept?

A. In the Homicide Office.

Q. Did you disclose or show this photo array to anyone outside the Homicide Office not connected with the Buffalo Police Department, Homicide Bureau?

A. No, sir.

Q. Did you disclose or reveal to anyone any photos of this defendant, including the photo that was used for this photo array?

A. No, sir.

Q. Did that conclude that day your involvement in terms of identification procedures with this case?

A. Yes, sir, it did.

Q. Were you involved in any way with the arrest of the defendant, Mario Zanghi?

A. No, sir.

Q. Prior to testifying today what did you review?

A. My P-73 with the conversation and the other P-73 with the photo array.

Ortiz - Direct - Marusak

20

Q. When you say the P-73 concerning the conversation, are you referring to the conversation with Officer Calloway?

A. Yes, sir.

Q. Did you also have an opportunity to review the photo array itself, as well as the affidavits?

A. Yes, I did.

MR. MARUSAK: Thank you, Your Honor. I would offer at this point People's Exhibits 1, 2 and 3.

MR. GREENMAN: I have no objection, Your Honor.

THE COURT: Received.

(Whereupon, People's Exhibits 1, 2 and 3 were received and marked in evidence.)

CROSS-EXAMINATION BY MR. GREENMAN:

Q. Detective, before these phone conversations you had with Mr. Turpin and Mr. Evans, had you talked with them prior to that time?

A. With -- yes, sir, I did.

Q. With Mr. Turpin or Mr. Evans?

A. Yes, sir, I did.

Q. Can you tell us the first time you spoke with them? Let's take Mr. Evans first. Did you speak with Mr. Evans before you spoke with him on the phone on the 22nd of

Ortiz - Cross - Greenman

21

1
2 July?

3 A. I'm sure I did.

4 Q. Well, let me ask you, Detective. Aside from
5 People's Exhibit 2 and 3, which are the documents you
6 referred to which were filled out at the identification of
7 the array, did you make any other notes with respect to this
8 investigation, handwritten notes?

9 A. Yes, sir, I did.

10 Q. All right. And did you make any handwritten
11 notes with respect to conversations you earlier had with
12 either Mr. Turpin or Mr. Evans?

13 A. Yes, sir.

14 Q. Do you have those with you, sir?

15 A. They would be within the file.

16 MR. MARUSAK: Judge, I have no notes of this
17 witness as regards any of the topics related to
18 this hearing. I have no notes relating to the
19 identification procedure or the conversations he
20 had with the witnesses in this regard, as well as
21 notes relating to his conversation with Officer
22 Calloway. All I have are the P-73s and the
23 affidavits themselves and that was my understanding
24 after talking with this witness.

25 THE COURT: Well, whether or not

Ortiz - Cross - Greenman

22

documentation that this officer may have reduced to writing following conversations with either of these witnesses is relevant to the questions presented at this hearing, I don't know, without knowing what's contained within the exhibit. Now, the officer said that he had spoken to Evans, presumably at some time subsequent to the shooting that occurred on the 20th of July, '95. So some time between July 20th and July 22nd had you spoken to the two other apparent witnesses to this event, Turpin and Evans?

THE WITNESS: Yes, sir.

THE COURT: Okay. And did your conversation with them -- was it memorialized by a report of some kind?

THE WITNESS: I took a statement from one of them.

THE COURT: Okay. Did -- separate and apart from their statements, did you prepare any kind of report of your own?

THE WITNESS: There's a P-73 for the activity of the case.

THE COURT: So there's a P-73 and then there's a formal statement taken from each with respect to

Ortiz - Cross - Greenman

23

their observations surrounding the incident and
your conversation with them about it?

THE WITNESS: Yes, sir.

THE COURT: And did -- was there portions of
that statement that bore upon their identification
of their assailant?

THE WITNESS: Yes, sir.

THE COURT: Then it seems to me, at least in
part, is bearing upon the subject matter of this
identification procedure and its fairness and the
like.

MR. MARUSAK: Judge, what I have is, it's my
understanding that this witness took a formal
statement only from one of the witnesses.

THE WITNESS: Correct.

MR. MARUSAK: That's Mr. Turpin.

THE COURT: Okay.

MR. MARUSAK: And I have a description -- I
have redacted that portion of the statement that
refers to a physical description of the shooter
from Mr. Turpin.

THE COURT: Well, if it's Turpin we're
talking about, fine. I think that's where Mr.
Greenman is going, a conversation with Turpin

Ortiz - Cross - Greenman

24

relative to his identification of the assailant.
And you've now provided that portion of his P-73
that bears upon it or is this Turpin's statement
with respect to --

MR. MARUSAK: Judge --

THE COURT: Just a minute.

MR. MARUSAK: I'm sorry.

THE COURT: Or is this a portion of Turpin's
statement to the police, which?

MR. MARUSAK: The portion I've provided is a
portion of Mr. Turpin's statement on July 20th in
which he gives a description. There's no
identification made, but simply a physical
description of the shooter.

THE COURT: Fine. Let's proceed. Mr.
Greenman, you have that.

MR. GREENMAN: Detective, aside from the
typewritten -- why don't you mark this.

(Whereupon, a one-page document was marked
Defendant's Exhibit A for identification.)

BY MR. GREENMAN:

Q. Showing you what's been marked as Defendant's
Exhibit A, what do you recognize this document to be?

A. It's a question -- the answer to a question of

Ortiz - Cross - Greenman

25

1
2 part of his statement.

3 Q. His being whom?

4 A. Mr. Turpin.

5 Q. And where was Mr. Turpin when you took this
6 statement?

7 A. In the Homicide Bureau office.

8 Q. And were you making any handwritten notes, sir,
9 with respect to your conversation with Mr. Turpin?

10 A. No, sir.

11 Q. The document that you have in your hand would
12 only be the -- would be the only memorialization of your
13 conversation with Mr. Turpin?

14 A. Yes, sir.

15 Q. How long did your meeting last with -- by the
16 way, was this on July 20th of 1995?

17 A. Yes.

18 Q. Can you give us your approximate -- your best
19 approximation as to what time this conversation took place?

20 A. I would say it was probably 6:30, seven in the
21 morning.

22 Q. All right. Now, was anyone else present beside
23 you and Mr. Turpin?

24 A. No, sir.

25 Q. Now, can you tell us, Detective, the description

Ortiz - Cross - Greenman

26

that Mr. Turpin gave to you when you were talking with him on the 20th?

A. It was a white male, large build, basically.

Q. He did -- first of all, how many people did he describe? More than one person?

MR. MARUSAK: Objection to the form.

MR. GREENMAN: I'll rephrase it, Judge.

THE COURT: Well, go ahead.

Q. You were talking with him about a shooting that had taken place over on Bryant, correct?

A. Yes, sir.

Q. And were you asking him to describe any of the people he had seen that evening?

A. I believe I asked him if he could identify them.

Q. I'm sorry?

THE COURT: Excuse me. Is it them or were you seeking to describe the person who discharged the weapon? I guess that's the first question. Were you just seeking a description of anyone who may have been present as the assailants?

THE WITNESS: I believe I asked him to identify the person that did the shooting.

THE COURT: And he gave the description of what?

Ortiz - Cross - Greenman

27

THE WITNESS: A muscular built male, I forget exactly, and he described --

THE COURT: Well, you got it in front of you, Mr. Greenman.

MR. GREENMAN: I'm sorry, Judge. I'll give it to him.

THE COURT: Take a look at it. Refresh your recollection. Is that the description you gave and tell me what it was?

THE WITNESS: Two guys, they were pretty stocky, like weight lifters, healthy, big. The guy with the gun was the bigger one. He had dark hair and so did the driver. They both had on light-colored shirts, short sleeves.

Q. Now, was that the extent, Detective, as you recall, of the description that he gave, that is, Mr. Turpin?

A. Yes, sir.

Q. Now, like in the description, I believe you referred to another person, is that correct, a second person?

A. Yes, sir.

Q. Did you get a description as to what that individual was wearing, aside from what you've just described or read from in Defendant's Exhibit 1 -- or A?

MR. MARUSAK: Objection to the relevance of

Ortiz - Cross - Greenman

28

the other person.

THE COURT: Well, you want the other person present, is that what you're talking about, the description of the other person present?

MR. GREENMAN: That's correct, Judge.

THE COURT: Well, I'll take it if it's part of the written reference.

THE WITNESS: No, sir.

Q. Now, other than the description that you have memorialized on this typewritten page, was there a further description of the person that he described wearing -- at least as being having a stocky build and wearing a light-colored shirt?

A. What do you mean by another description? From where?

Q. Well, he told you that the one person had dark hair; is that correct?

A. Yes, sir.

Q. And did you ask him at least the coloration of the hair aside from being dark?

A. I don't recall.

Q. Did you -- you don't recall asking him or you don't recall whether he gave you a further description?

A. Both.

Ortiz - Cross - Greenman

29

Q. Did you ask him about the length of this individual's hair?

A. I don't think I went that far in the statement.

Q. Now, I apologize, but I can't recall if you indicated you took a sworn statement from another individual or did you take a sworn statement from Mr. Turpin?

A. I took a sworn statement from Mr. Turpin.

MR. GREENMAN: Judge, I'd ask that be produced at this point in time.

THE COURT: Denied. Come on. Let's get to the point in time that we're dealing with and that is the actions of the 22nd and the propriety or impropriety of this array as being suggestive or not relative to the witnesses' ability to identify the perpetrators involved in this event. This is not a full-fledged discovery proceeding in which we are to embark upon every aspect of the case.

Q. Detective, let me ask you this. Before you showed these arrays to Mr. Turpin and Mr. Evans, on I believe the 22nd, had you prepared any other arrays with respect to this case?

A. No, sir.

Q. To your knowledge, had anybody been asked to observe or look at any photographs of possible suspects?

Ortiz - Cross - Greenman

30

A. I don't believe so.

Q. Now, you've indicated that the arrays that -- I'm sorry, the array that you prepared was obtained from mug shots; is that correct?

A. Yes, sir.

Q. And the six photographs that I have here in People's Exhibit 1 that I'm showing are all mug shot identification, mug shot photographs; is that correct?

A. Yes, sir.

Q. Now, can you tell me, sir, where you got Mr. Zanghi's photograph?

A. From the Photography Unit.

Q. And --

THE COURT: I didn't hear it.

THE WITNESS: From the Photography Unit.

Q. Is that a unit located within Buffalo Police Headquarters?

A. Yes, sir.

Q. And do you recall where you obtained the photograph from, that is, from whom?

A. No. There was -- upstairs in the office there they have a bunch of pictures that are used to pick out look-alike individuals.

Q. Well, did you ask for a photograph of Mario

Ortiz - Cross - Greenman

31

Zanghi?

A. Yes, sir.

Q. And were you given one photograph of him or were you given more than one?

A. There was two.

Q. And the photograph that's depicted in People's Exhibit 1, that was one of the two photographs that you were given?

A. Yes, sir.

Q. And the second photograph, was it the same photograph as appears in this array?

A. Yes, sir.

Q. So there were actually two photographs of the same person; is that correct?

A. Yes, sir.

Q. Now, did you take both photographs with you?

A. No, sir.

Q. You left one there?

A. Yes, sir.

Q. Were you aware, Detective, that Mr. Zanghi's photograph appeared in the Buffalo News?

MR. MARUSAK: Objection to the form of the question as to what day we're talking about.

THE COURT: Sustained. Too broad a question.

Ortiz - Cross - Greenman

32

(Whereupon, a two-page document (article) was marked Defendant's Exhibit B for identification.)

Q. Detective, showing you what's been marked as Defendant's B for identification, do you recognize the photograph that appears on that sheet of paper, the top sheet of paper?

A. Yes, sir.

Q. And whose photograph is that?

A. Mario Zanghi.

Q. And as you look, sir, at People's Exhibit 1 in evidence, is that, at least that one photograph, the same photograph that appears on the photographic array, the left of his photograph?

A. It looks the same.

MR. GREENMAN: Judge, I have the original, the newspaper article, if you need it.

THE COURT: Well, I'm looking at Defendant's B, which is dated, if accurate, July 23rd, '95, a report in the newspaper suggesting officers charge suspect in murder of college student. And the photograph as depicted in the News does appear to be that as being the same as photo five left profile.

Q. Now, Detective, did you release that photograph

Ortiz - Cross - Greenman

33

to the Buffalo News?

A. No, sir.

Q. Do you know who did, sir?

A. No, sir.

Q. Did you see this photograph in the newspaper as it appeared on July 23rd?

A. Yes, sir, I did.

Q. Did you cause any inquiry to be made as to how the Buffalo News obtained the same photograph that you were showing at least the two prospective witnesses?

A. No, sir, I didn't.

Q. Was any inquiry made that you know of by the Buffalo Police Department as to how it was that that same photograph appeared in the Buffalo News?

A. I couldn't tell you.

Q. You testified, Detective, that you made a phone call of the two men, Turpin and Evans, about viewing some photographs at a later time; is that correct?

THE COURT: Excuse me. What later time?

Q. On July 22nd you spoke with Turpin and Evans on the phone; is that correct?

A. Yes, sir, I did.

THE COURT: That was prior to any publication of the photograph in question of July 23rd, was the

Ortiz - Cross - Greenman

34

stated publication.

Q. And when you spoke with them, sir, did you have their phone numbers available to you?

A. Yes, sir.

Q. Was it you who made the telephone calls?

A. Yes, sir.

Q. Now, who did you call first, do you recall?

A. I don't recall which one I called first.

Q. Did you reach them at different phone numbers?

A. Yes, sir.

Q. And did you ask, at least the first of the persons you spoke with, did you ask them if you could come over to his house?

A. Yes, sir.

Q. And you've testified that at some point during the conversation you indicated that you wanted him to look at some photographs?

A. Yes.

Q. Did you indicate to him that this was with respect to this investigation, that is, the shooting that had taken place on July 20th?

A. I couldn't tell you if I really indicated that, but I told him I wanted to show him pictures to see if he could identify anybody.

Ortiz - Cross - Greenman

35

Q. Did you memorialize, sir, your conversation in a report or handwritten note as to what you said to the first person you spoke with?

A. On the telephone?

Q. Yes, sir.

A. No, I didn't.

Q. And when you spoke with the second individual, did you also tell him that you wanted him to look at some photographs?

A. Yes, sir.

Q. And do you recall the exact language that you used in the second conversation you had with him?

A. Well, I couldn't tell you the exact language, but it was probably the same as the first one.

Q. You didn't memorialize into any notes or memorandum your second conversation?

A. No, sir.

Q. Did you ask them on the phone whether they had viewed any other photographs before your telephone call to them?

A. No, sir.

Q. Did you ask either one of them when you visited them at their homes whether, in fact, they had seen other photographs which were shown to them by anyone else?

Ortiz - Cross - Greenman

36

1
2 A. No, sir.

3 Q. So whether, in fact, they had, indeed, looked at
4 other photographs you did not know at that time, true, when
5 you first visited them?

6 A. True.

7 Q. And the first person that you -- at least whose
8 home you went to was Mr. Evans' home; is that right?

9 A. Yes, sir.

10 Q. And can you tell us, sir, I'm not asking you
11 where he lived, but can you tell us, sir, in relation to
12 where Mr. Turpin was staying, the distance between the two
13 homes, how long it took you to get from one to the other?

14 A. Within five minutes.

15 Q. Now, when you had prepared the array, you had
16 also attempted to take -- at least to place into this array
17 five other mug shots, is that correct, of five other
18 individuals?

19 A. Yes, sir.

20 Q. And Mr. Marusak asked you some questions about
21 whether you were under any time constraints?

22 A. Yes, sir.

23 Q. When were these men going to leave for the
24 funeral, did they tell you?

25 A. That afternoon. I'm not sure what time.

Ortiz - Cross - Greenman

38

1
2 Q. We can see here that photos one, two, four and
3 six show individuals with white shirts on; is that correct?

4 A. Yes, sir.

5 Q. And Mr. Zanghi's shirt is a darker blue color; is
6 that correct?

7 A. Yes, sir, it is.

8 Q. Now, did you attempt, sir, in looking at the
9 third photograph, to do anything to hide that individual's or
10 to cover that individual's shirt?

11 A. No, sir.

12 Q. All right. Could you tell, sir, before you put
13 the photograph into the slot what color shirt that individual
14 had?

15 A. I really couldn't tell you.

16 Q. If you take a look at it, Detective, and I think
17 if you could manipulate it a little bit, maybe you could see.

18 A. Yes, sir.

19 Q. What color shirt did that person have?

20 A. Looks like possibly blue, dark in color.

21 Q. All right. And that shirt was covered by the
22 manner in which it appeared in the slot; is that correct?

23 A. Yes, sir.

24 Q. So the only individual whose at least shirt
25 coloration, aside from white, appears in the photographs is

Ortiz - Cross - Greenman

39

1 Mr. Zanghi; is that right?

2 A. Yes, sir.

3 Q. Before showing the photographs to Mr. Evans, did
4 you ask him to give you any further description of the
5 individuals they had seen on July 20th?

6 A. No.

7 Q. Did he offer any further descriptions?

8 A. No. We really didn't exchange much conversation.

9 Q. Essentially, in terms of facial features we have
10 something to the extent that they were stocky, like body
11 builders, and dark hair; is that correct? That's basically
12 what you had to work from?

13 A. Yes, sir.

14 Q. Can you tell me, Detective, how long it took you
15 to prepare the array, People's Exhibit 1?

16 A. I would say probably about half an hour.

17 Q. How many photographs, sir, did you look at out of
18 all the photographs that were given to you at Buffalo Police
19 Headquarters?

20 A. Probably a couple hundred.

21 Q. That was not the extent of all the photographs
22 that they had at their availability, correct?

23 A. No, sir. There's more.

24 Q. Did you ask to go any further than the
25

Ortiz - Cross - Greenman

40

1
2 photographs that were initially given to you?

3 A. No, sir.

4 Q. Now, you knew that after you had seen Mr. Evans
5 you were going to go over to Mr. Turpin's home; is that
6 correct?

7 A. Yes, sir.

8 Q. Were any police officers sent over to Mr.
9 Turpin's home to ensure that he would not speak with Mr.
10 Evans or someone calling him on behalf of Mr. Evans?

11 A. No, sir.

12 Q. When you got to Mr. Turpin's home, was anybody
13 else home beside him?

14 A. Yes, sir. There was a young lady and a child.

15 Q. You testified that he was on the phone when you
16 arrived?

17 A. Yes, he was.

18 Q. And did you ask him the name of the person you
19 were speaking with?

20 A. Whom he was speaking with?

21 Q. Yes, sir.

22 A. Yes, I did.

23 Q. What was the name of that person?

24 A. I said I couldn't recall.

25 Q. Your testimony was something to the extent that

Ortiz - Cross - Greenman

41

you asked him if he had talked with Mr. Evans; is that correct?

A. I asked him who he was speaking with and then I asked if Mr. Evans had called him.

Q. All right. Whether the person he was speaking with called him on behalf of Mr. Evans, you did not know, true?

A. Correct.

Q. And you did not ascertain whether that person had called on behalf of Mr. Evans, correct?

A. Correct.

Q. Had you left any officers with Mr. Evans after you left his home to ensure that he wouldn't call Mr. Turpin?

A. No, sir.

Q. Did you ask either Mr. Turpin or Mr. Evans whether they had talked with each other earlier that day before at least you went to their homes respectively?

A. No, I didn't.

Q. Now, when you showed Mr. Evans the photographic array, did you ask him whether he had seen any of the photographs before you showed them to him --

A. No.

Q. -- People's Exhibit 1. Did you ask Mr. Turpin whether he had ever seen any of the photographs before you

Ortiz - Cross - Greenman

42

showed People's Exhibit 1 to him?

A. No.

Q. Detective Ortiz, on the second page of People's Exhibit 1 in evidence there is a bunch of numbers; is that correct?

A. Yes, sir.

Q. And do those numbers represent numbers that were attributed to the various photographs?

A. Yes, sir, they are.

Q. I'm sorry. Go ahead.

A. Yes, they are.

Q. All right. Where did those numbers come from, do you know?

A. From the front of the picture.

Q. This would -- I'm sorry. Would it be from the front of the picture of something below this?

A. Yes, below that hasn't been exposed.

Q. And was the second page of People's Exhibit 1, was that attached to the first page as it is now when you showed them to Mr. Turpin?

A. Like it is now, no, sir.

Q. When was that attached?

A. I really couldn't tell you. It was covered on the front.

Ortiz - Cross - Greenman

43

Q. Now, when you first met with Mr. Evans, Detective Lipinczyk was with you; is that correct?

A. Yes, sir.

Q. And you sat him down somewhere in the house and the three of you were all seated together?

A. Actually, he was seated. We were standing.

Q. All right. And before you showed him the array, did you have any other conversation with him?

A. Just ask him how he was doing, that's all.

Q. Did you remind him of the fact that he had given you a description of an individual or individuals with respect to the July 20th incident?

A. No, sir.

Q. Okay. Did you give him any instructions after you sat down with him?

A. Actually, I didn't. Detective Lipinczyk did.

Q. All right. Can you tell us what Detective Lipinczyk did with him or said to him?

A. Asked him if he would take the cover off of the photos and see if he could recognize anybody in the photos.

Q. All right. Now, there is a cover that was on this exhibit, some kind of a cover?

A. Yes, the back of that.

Q. Which would be the second page I showed you

Ortiz - Cross - Greenman

44

1 before?

2 A. Correct.

3 Q. All right. Can you tell us, Detective, how this
4 was covering the photographs?

5 A. It was covering with the blank side on the
6 outside.

7 Q. So that the handwriting would be facing the
8 photographs?

9 A. Yes, sir.

10 Q. All right. Was it affixed to it in any way? In
11 other words, was it attached?

12 A. No, sir, it wasn't.

13 Q. Who was it who gave the photographs to Evans?

14 A. Detective Lipinczyk did.

15 Q. And he asked him to take the cover off, at least
16 to remove the cover?

17 A. Yes.

18 Q. Was there some reason that you knew of that the
19 cover had not been removed prior to that time?

20 A. We just don't expose the pictures until the
21 person is sitting down to remove the cover, so they can look
22 at it themselves.

23 Q. Did you ask him before showing him the
24 photographs whether he felt he'd be able to identify the
25

Ortiz - Cross - Greenman

48

Q. As -- I'm sorry, as of July 22nd?

A. No, sir.

Q. You don't have any knowledge one way or the other?

A. No.

Q. Does a police officer have access to the photographs upon request at the Buffalo Police Headquarters, that is, the mug shots?

A. I believe they do.

THE COURT: Anything on redirect?

MR. GREENMAN: Judge, may I ask one last question, sir?

THE COURT: Well, let's be about it.

MR. GREENMAN: Did you determine -- at least either before or after you or Detective Lipinczyk told these men that the individual's name was Mario Zanghi, did you ask either one of them whether they knew the name Mario Zanghi?

THE WITNESS: No, sir.

MR. GREENMAN: That's all I have, Your Honor.

MR. MARUSAK: Were you aware of any other office or department within the Buffalo Police Department that was investigating this homicide besides your department?

Attorney Who May Be Called As a Witness Is Disqualified Due to Conflict of Interest

UNITED STATES V. NAT SCHLESINGER — This case involves charges of fraud, among other things. The court has ruled to disqualify Attorney Carl Schlesselman, of counsel to defendant Herman Niederman, from representing defendant Nat Schlesinger ("Schlesinger").

BACKGROUND

The Supreme Court's decision in *Waller v. Illinois State Bar Ass'n*, 474 U.S. 498 (1985), and *Cuyler v. Sullivan*, 458 U.S. 91 (1982), established and extended the rule that a conflict of interest exists when an attorney represents multiple parties with adverse interests. The court in *Waller* held that the defendants with conflicting interests in a series of fraudulent business transactions to give the false appearance to creditors that title to PB's assets had been transferred to California ("California") and the other defendant, Nat Schlesinger ("Schlesinger"), and that both defendants were to be held liable for the same. The court in *Cuyler* held that the defendant's attorney, who was also the attorney for the other defendant, was disqualified from representing the defendant. The court in *Cuyler* held that the defendant's attorney, who was also the attorney for the other defendant, was disqualified from representing the defendant. The court in *Cuyler* held that the defendant's attorney, who was also the attorney for the other defendant, was disqualified from representing the defendant.

The court in *Cuyler* held that the defendant's attorney, who was also the attorney for the other defendant, was disqualified from representing the defendant. The court in *Cuyler* held that the defendant's attorney, who was also the attorney for the other defendant, was disqualified from representing the defendant. The court in *Cuyler* held that the defendant's attorney, who was also the attorney for the other defendant, was disqualified from representing the defendant.

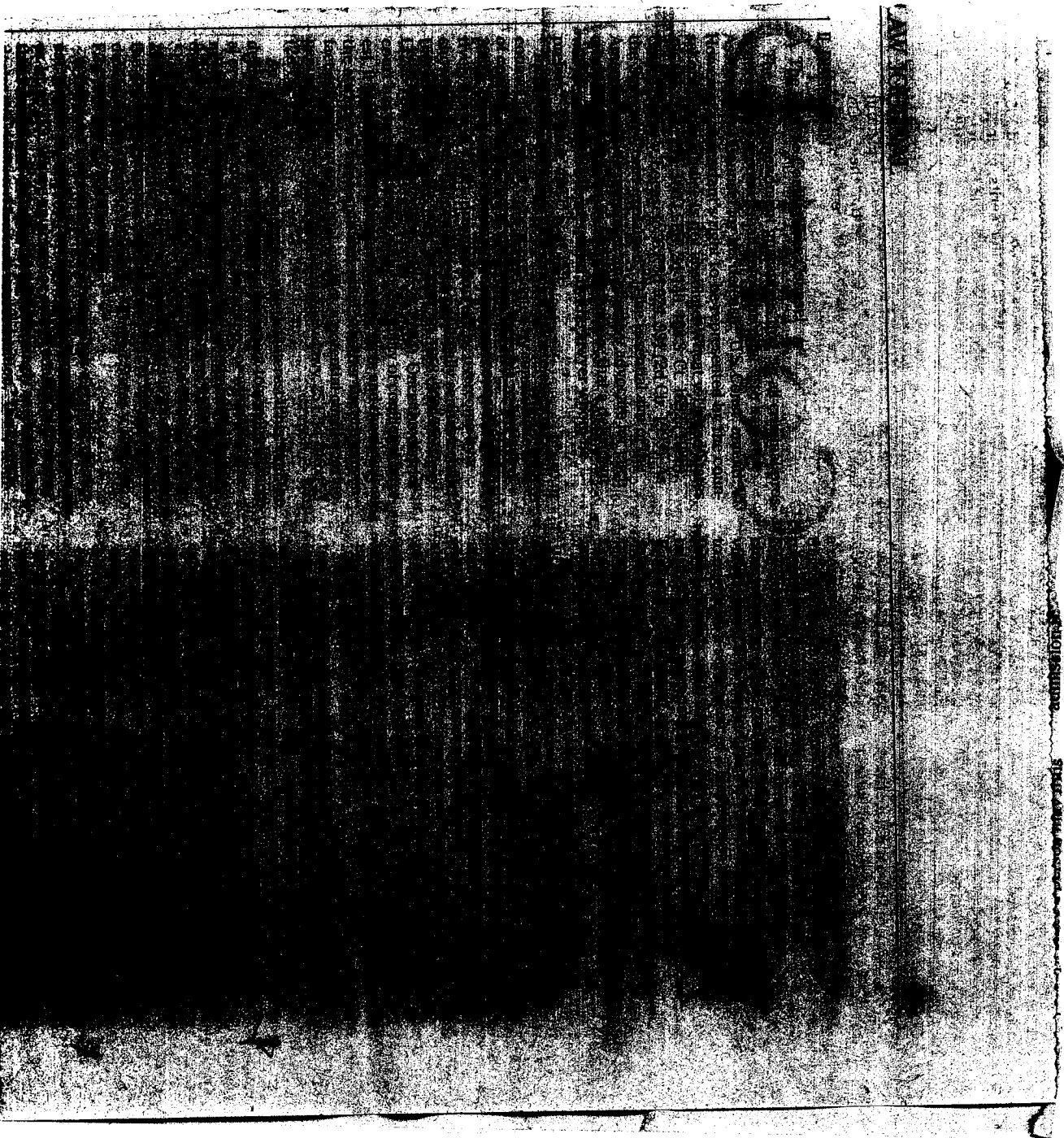
The court in *Cuyler* held that the defendant's attorney, who was also the attorney for the other defendant, was disqualified from representing the defendant. The court in *Cuyler* held that the defendant's attorney, who was also the attorney for the other defendant, was disqualified from representing the defendant. The court in *Cuyler* held that the defendant's attorney, who was also the attorney for the other defendant, was disqualified from representing the defendant.

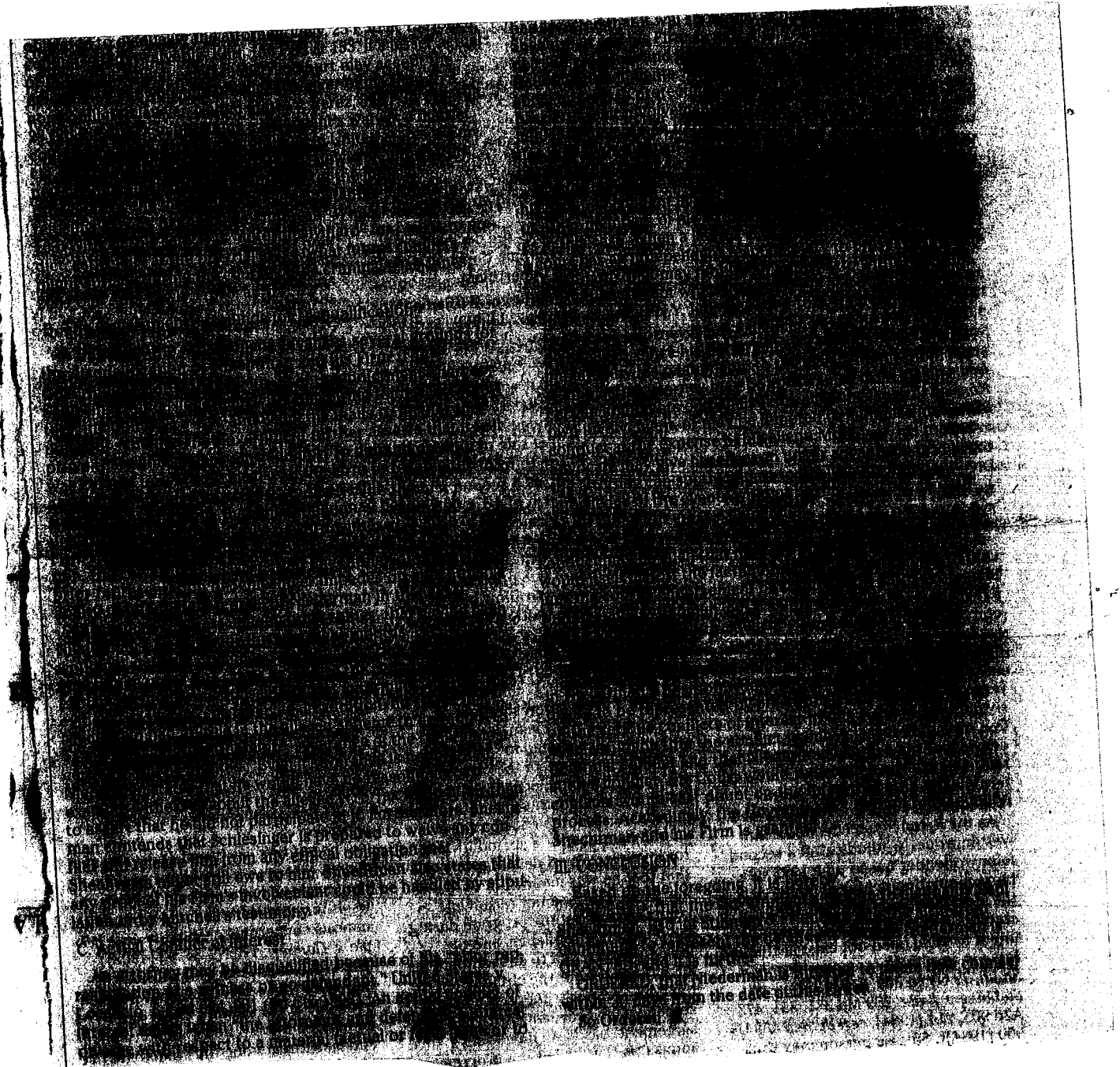
The court in *Cuyler* held that the defendant's attorney, who was also the attorney for the other defendant, was disqualified from representing the defendant. The court in *Cuyler* held that the defendant's attorney, who was also the attorney for the other defendant, was disqualified from representing the defendant. The court in *Cuyler* held that the defendant's attorney, who was also the attorney for the other defendant, was disqualified from representing the defendant.

The court in *Cuyler* held that the defendant's attorney, who was also the attorney for the other defendant, was disqualified from representing the defendant. The court in *Cuyler* held that the defendant's attorney, who was also the attorney for the other defendant, was disqualified from representing the defendant. The court in *Cuyler* held that the defendant's attorney, who was also the attorney for the other defendant, was disqualified from representing the defendant.

The court in *Cuyler* held that the defendant's attorney, who was also the attorney for the other defendant, was disqualified from representing the defendant. The court in *Cuyler* held that the defendant's attorney, who was also the attorney for the other defendant, was disqualified from representing the defendant. The court in *Cuyler* held that the defendant's attorney, who was also the attorney for the other defendant, was disqualified from representing the defendant.

The court in *Cuyler* held that the defendant's attorney, who was also the attorney for the other defendant, was disqualified from representing the defendant. The court in *Cuyler* held that the defendant's attorney, who was also the attorney for the other defendant, was disqualified from representing the defendant. The court in *Cuyler* held that the defendant's attorney, who was also the attorney for the other defendant, was disqualified from representing the defendant.





1
2 MR. GREENMAN: Well, that leads us, Your
3 Honor, to the next issue, which I was about to
4 approach the Court, is whether or not we ask the
5 Court to consider whether, in fact, his willingness
6 to speak with me over the past 6, 7 or 8 months
7 amounted to a waiver, certainly, of the 5th
8 Amendment privilege, certainly, when he had the
9 right and the knowledge that he could have counsel
10 present when I spoke with him and even speaking
11 with me after he had counsel present.

12 THE COURT: People say a lot of things
13 either to each other or even to a lawyer in the
14 preparation of a trial, but it's what's said here
15 under oath before a jury that is dominant. So
16 whether Mr. Runfola spoke to you truthfully or not,
17 I don't know. Whether he would speak from the
18 stand truthfully, I don't know, nor do you.

19 MR. GREENMAN: Your Honor, the other issue
20 that we ask the Court to allow us to address is the
21 issue, if, in fact, Mr. Runfola is allowed to
22 assert the privilege and is not granted immunity,
23 what that does vis-a-vis my conversations with him.
24 I had indicated to Court earlier that Mr. Cambria
25 and I -- Mr. Cambria, is present in the courtroom,

1
2 and I had talked over the lunch hour after we
3 realized what was happening here late this morning.
4 And I know that Mr. Cambria wanted the permission
5 at least to address the Court. And the reason for
6 him addressing the Court, Your Honor, is by virtue
7 of the fact of a conflict which then arises by
8 virtue of my being counsel for Mr. Zanghi and the
9 fact that I believe we will make application to the
10 Court to allow me to testify as to what it was that
11 Mr. Runfola has told me on the numerous occasions
12 that I've talked with him.

13 I would indicate, Judge, that -- apologize if
14 my notes are a little bit tough to read, but I can
15 certainly decipher them for Mr. Marusak with no
16 problem, so he wouldn't have the problem in terms
17 of reading my notes. I don't believe they're
18 cryptic. I think, if he could read everything, he
19 will see that they are very clear and concise and
20 tell the whole story, as far as what happened that
21 evening into the next morning. So, if the Court
22 wanted to hear from my office, from my partner or
23 one of my partners, we would ask the Court to at
24 least give us the -- in the first instance, the
25 time to look at the cases. As Your Honor is aware,

1
2 this just came up this afternoon for the first
3 time. We didn't expect it. I have no reason it
4 was going to happen. Indeed, I was believing that
5 the opposite would happen, that, in fact, he would
6 remain available, would not seek shelter from the
7 5th Amendment.

8 THE COURT: What you're proposing or
9 suggesting is that you now get on the stand and
10 testify as to what Runfolo told you?

11 MR. GREENMAN: Yes, Your Honor.

12 THE COURT: Not under oath, but as an alleged
13 statement against penal interest?

14 MR. GREENMAN: That's correct, Your Honor.

15 THE COURT: Well, it's not against his penal
16 interest if he is offering inculpatory testimony
17 against someone other than the defendant and is not
18 offering any exculpatory testimony relative to
19 himself or any inculpatory testimony to himself,
20 right?

21 MR. GREENMAN: If that's the case, then he
22 shouldn't be allowed to take the 5th in the first
23 place, Your Honor. That's what our position is,
24 Your Honor.

25 THE COURT: Well, I don't see that tender as